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No. 278

Supreme Court of the United States

OCTOBER TERM, 1919

WILLIAM G. STREET

Plaintiff-Appellant

against

LINCOLN SAFE DEPOSIT COMPANY and DANIEL L. PORTER

Defendants-Appellees

BRIEF ON BEHALF OF APPELLANT

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Supreme Court of the United States

OCTOBER TERM 1919, No. 795.

WILLIAM G. STREET,
Appellant,

against

LINCOLN SAFE DEPOSIT COMPANY
and DANIEL L. PORTER,
Appellees.

APPELLANT'S BRIEF.

This is an appeal from a decree of the United States District Court for the Southern District of New York, dismissing the appellant's bill of complaint upon the motion of the appellee Porter. The case presents these questions:

(1) Whether the National Prohibition Act prohibits the possession in a warehouse of liquor acquired and stored there long before the enactment of the Act, when the purpose of such possession is lawful, *i. e.*, private consumption by the owner and his household; and

(2) Whether if such is the meaning of the Prohibition Act, it is in this respect constitutional.

District Judge Knox answered both questions in the affirmative, with an opinion (fol. 22).

The appellant herein is a citizen and resident of the State of New York (fol. 4). For many years he had stored goods with the Lincoln Safe Deposit Company in its storage warehouse at No. 60 East 42nd Street, New York City. For this purpose he had leased three rooms in the warehouse, and in one of these rooms and with his other goods he has had for many years certain wines and liquors. These were owned by appellant and in his exclusive possession and control. They were intended and will be used only for private consumption by himself and the members of his family or his *bona fide* guests (fol. 5).

The appellee Porter, agent of the Commissioner of Internal Revenue, contended that such liquor, inasmuch as it was not in a private dwelling, was unlawfully possessed and was subject to seizure (fol. 6). He impressed this view upon the defendant Lincoln Safe Deposit Company, which thereupon issued a notice that such goods could not remain with it after Title II of the National Prohibition Act became effective (fol. 7), notwithstanding that all storage charges had been paid (fol. 5).

These wines and liquors are of great and unique value (fol. 9). Appellant sets forth in the complaint that he does not intend to remove them voluntarily except from time to time as they may be required for his private consumption (fol. 8). He cannot sell them. He cannot dispose of them lawfully. The appellee Porter threatens to seize them and to treat them as outlawed goods (fol. 8). He is acting and threatens to act solely under the Eighteenth Amendment to the Constitution of the United States and the National Prohibition Act (fol. 9).

Appellant insists that neither the Eighteenth Amendment to the Constitution of the United States nor the National Prohibition Act renders the possession by him unlawful; that any construction of that Act that such possession is unlawful would render such Act, at least to that extent, unconstitutional and would violate his rights under the Constitution of the United States (fol 9).

The appellant asked an injunction against the defendants restraining them from taking the threatened action in regard to his possession of and property in these wines and liquors in the rooms leased by him in the warehouse (fol. 10).

Inasmuch as the bill of complaint was dismissed on its face, all the facts well pleaded therein must be taken as true; and Judge Knox so held (fol 23).

POINT I.

The Eighteenth Amendment does not prohibit or authorize the prohibition of the continued possession of lawfully acquired liquor in a warehouse for the purpose of personal consumption by the owner of the liquor.

The Eighteenth Amendment reads:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

I

There are three classes of powers in regard to liquor prohibition, two of which have recently been considered by this Court,—(1) the State police power; (2) the Federal war power; and (3) the Federal power under the Eighteenth Amendment.

In regard to the State police power, this Court in *Crane* v. *Campbell*, 245 U. S., 304, determined than an act of a state legislature expressly prohibiting possession of intoxicating liquor was within the State's plenary police power; and that such prohibition was not without proper relation to the legitimate legislative purpose.

In regard to the Federal war power. this Court in *Ruppert* v. *Caffey*, determined that the war power of Congress over liquor was "as full and complete as the police power of the State."

In each of these instances a plenary and original sovereign power was being construed. The extent and boundaries of the power were not to be found in any words; and the power itself covered all forms of intoxicating liquor and all possible relationships thereto. The power was as broad as necessity and the legislature was the sole judge of such necessity.

The nature of the power involved in such decisions is indicated by the opinion of this Court in *Sligh* v. *Kirkwood*, 237 U. S., 52, wherein Mr. Justice Day said (p. 58):

> "The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court * * *. *It is not subject to definite limitations*, but is co-extensive with the necessities of the case and the safeguards of public interest * * *. In one of the latest utterances of this court upon the subject it was said: 'Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. *It is not susceptible of circumstantial* precision.'"

The precise boundaries of the police power are difficult to mark; the exact limitations cannot be defined by any general rule (*Keller* v. *U. S.*, 213 U. S., 138, 144).

In the present instance the third class of power above-mentioned is alone involved. No plenary power is before the Court for construction. A hesitancy to define or to find limitations is unwarranted. The source of the power is definite and clear. A constitutional amendment which has the effect of specific legislation, evidenced in words of accepted meaning, is before the Court for construction. This definite expression of power was submitted to the people. As they understood it they gave it their approval; and it cannot be presumed that the States which ratified it intended to part with any of their own exclusive sovereignty and police power beyond the plain meaning of the words of the Amendment. It was their intent,

as expressed in the simple and unambiguous words of the Amendment, which grants the power and at the same time places the limitations upon it.

The words contained in the Amendment are not vague or ambiguous. They show that limitations were intended.

The power over intoxicating liquor was in the States and not in the Federal Government (*Keller* v. *U. S.*, 213 U. S., 138, 144). The Constitution contained no delegation of this power to the Federal Government. It did not prohibit it to the States. It was therefore reserved to the States respectively or to the people. Mr. Justice Brandeis, in *Hamilton* v. *Kentucky Distilleries*, 251 U. S., 146, 156 stated:

> "That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true."

No previous provisions of the Constitution of the United States or of the amendments thereto were intended or could be construed as interfering with the plenary and exclusive power of the State over liquor within the boundaries of the State.

In *Barbier* v. *Connolly*, 113 U. S., 27, this Court, per Field, J., at page 31 said:

> "But neither the Amendment (Fourteenth Amendment)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes called its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

II.

The Eighteenth Amendment *does* for the first time infringe upon this plenary and exclusive state power, and hence, any limitations in the Amendment itself will be given effect by the Court. The intention of such limitations is obvious, *i. e.*, that there be no interference with the State police power save to the extent indicated by the specific language.

The police power of the States, under its enlarged function and province, as laid down by this Court in numerous decisions, and notably in *Noble State Bank* v. *Haskell*, 219 U. S., 104, and subsequent cases, is the chief security of statehood to-day. Deprived of that power—as they have been of any authority to legislate concerning interstate commerce—the States would indeed be little more than political Boroughs.

The doctrine of state rights is fundamental in our system of government, and rests on the inviolability of the police power of the several states. "That power," to quote *Hall* v. *Geiger-Jones Co.*, 242 U. S., 539, 548, *"is the least limitable of the exercises of government."*

III.

The Eighteenth Amendment is in two parts which, stated in inverse order, are: a grant of power to enforce and an enumeration of the prohibitions as to which it is to be exercised.

Both parts carry a limitation carefully expressed.

The grant of power to enforce is limited by the express reservation of a "concurrent power" to the several States.

The prohibitions are in turn limited by their restriction to certain acts, as distinct from all acts, having to do with intoxicating liquor. These are: (1) manufacture, (2) sale, (3) transportation, (4) importation and (5) exportation of intoxicating liquors.

The gravamen of the whole amendment is that as to these specified prohibitions—and none others—Congress has received from the States a delegation of concurrent power of enforcement declared by the amendment itself.

The enumeration, however, does not cover all relationships to intoxicating liquors. It covers only manufacture and traffic. It omits possession, storage and consumption. As to these relationships its "well-timed silence hath more eloquence than speech."

What was said in *United States* v. *Harris*, 177 U. S., 305, 309, concerning a certain statutory enumeration of classes of persons applies equally here to this enumerated classes of acts:

> "Giving all proper force to the contention of the counsel of the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. *It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment*, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

This Amendment differs from the other constitutional amendments in that it is not a declaration of a governmental principle, but, in itself, a piece of specific legislation, and that, too, of a penal nature. The power conferred is not a power to declare or withhold prohibitions; nor is it a power, such as the interstate commerce power, which runs the whole gamut of legislative discretion.

The power conferred is simply the power of enforcement. Indeed, it is not strictly even a power of enforcement, in the sense of executing any general policy, for what shall be prohibited is precisely declared in the Amendment itself, and Congress is not authorized to add to or subtract from that enumeration. Its sole function is the duty of giving the existing enumerated prohibitions enforcement "by appropriate legislation."

As said in the *Civil Rights Cases*, 109 U. S., 3, of a constitutional amendment somewhat similarly framed (p. 11):

> "In order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effecually null, void, and innocuous. *This is the legislative power conferred upon Congress, and this is the whole of it.*"

In other words, the Eighteenth Amendment opens with a table of five commandments, declared, not by Congress, which had no power to promulgate any, but by the sovereign people of the country. The only power which Congress has

is a delegated power to see to it that those commandments are obeyed; and this duty is itself restricted in its exercise to "appropriate legislation."

To be appropriate the legislation must be germane to the commandments themselves and confined within their scope. Legislation which, under guise of enforcement, seeks to set up other commandments or a more general policy or seeks to do more than enforce the five enumerated prohibitions, is not appropriate legislation but usurpation. However far the several states, in the exercise of their reserved sovereign power, may go in the erection of new commandments or in the pursuit of new or larger policies, Congress is not thus free, for it has received from the hand of the people a complete definition of policy and a detailed chart of its application, and its power and its duty begin and end within those carefully fixed limits.

What the Amendment does *not* do is, in its interpretation, as important a guide as what it does do.

It does *not* confer plenary jurisdiction upon Congress over intoxicating liquor.

It does *not* authorize Congress to declare what shall and what shall not be prohibited.

It does *not* outlaw all intoxicating liquor.

It does *not* prohibit or make criminal the having or the drinking of intoxicating liquor.

It does *not* suspend or restrict the plenary power of the States to enact prohibition legislation.

If any of these powers were intended by the framers of this Amendment to be conferred upon Congress, they were most successful in employing language to conceal thought; and for Con-

gress now to endeavor to seize these powers on the excuse of "implication" would be to work a sort of fraud upon the ratifying States, and to tear from them reserved powers which it cannot be presumed they would part with except by express and conscious grant.

The very framework of the Amendment itself prohibits any such construction. It enacts its own prohibitions; and the assumption must be that those prohibitions were deemed as many as could be enumerated without preventing the ratification of the amendment. Now to add to them by treating the whole subject of intoxicating liquor as within the jurisdiction of Congress, or by bringing within its jurisdiction relationships to intoxicating liquors other than those enumerated in the Amendment itself, is to do by indirection what evidently could not have been done directly and to render either ununderstandable or worse the appearance of careful limitations in the terms of the grant which the States were asked to make.

If such had been the purpose of the Amendment, it would have been simple to have prohibited all intoxicating liquor,—to have banned its mere possession or its consumption. It would have been simple to have declared a confiscation of the enormous stocks of liquor all over the country and to have outlawed the multitude of varieties of possession and use in them. But it is certain that such a harsh and unlimited grant of power to the Federal Government would not have been approved or adopted by the people of the United States. The limitations in the enumeration of the Amendment are inherent in the intention of the adopters and were necessary to the adoption. How much more applicable, therefore, is the following language of this Court in *United States* v. *Weitzel*, 246 U. S.,

533, 543, to this amendement than it was to the statute then involved:

> "Statutes creating and defining crimes are not to be extended by intendment because the Court thinks the legislature should have made them more comprehensive."

IV.

The distinction between enumeration in a delegated power of the specific objects to which it was to be applied and a general grant of power unlimited by enumeration was well recognized in prohibition legislation and judicial decision at the time the words of this Amendment were selected and were adopted.

In *Ex Parte Francis*, 79 So. Rep., 753, the Constitution of Florida reserved to the people the right by direct vote to prohibit "the sale" of intoxicating liquor in such counties as should so determine. It also authorized and required the legislature to enact laws to enforce such prohibition. The legislature passed a law not only prohibiting the sale of intoxicating liquors in "dry" counties but also limiting the amount of such liquor which any person might have in his possession for personal use in such counties. This law could not be justified under the general police power possessed by the legislature, because of the lack of uniformity in its operation. It could be justified, if at all, only as a proper method of enforcing the prohibition which the people reserved the right to establish by direct vote in such counties as should vote for prohibition. The Supreme Court of Florida held that the provisions of the law limiting the quantity of liquors which a person might have in his possession

for personal use in "dry" counties, were unconstitutional and void. The Court said (p. 54):

> "Section 1 of Article 19 of our Constitution reserves to the people the right by their direct vote to prohibit *the sale only* of intoxicating liquors, *not their ownership, possession or individual use* by the citizen, and by the second section of the article the legislature is expressly authorized and required to enact laws to carry out the provisions of section one, that is, to enforce the prohibition against the sale. And when the legislature goes outside the realm of law aimed at prohibiting the unlawful sale of such liquors by inhibiting the private ownership, possession or personal use it transcends its authority under the Constitution and its act is void."

In *Town of Cortlandt* v. *Larsen*, 273 Ill., 602, the charter of the town of Cortlandt gave to the Board of Trustees "exclusive power to regulate, prohibit or license the selling of spirituous, vinous and malt liquors of any kind within the corporate limits"; also the right "to make all such ordinances from time to time and alter, amend and repeal the same as shall be necessary to carry into effect and execution the powers specified in this act." The Board of Trustees passed an ordinance of which the material portion is as follows:

> "Whoever shall within the corporate limits, directly or indirectly, keep or maintain by himself or by associating or combining with others, or shall in any manner aid, assist or abet in keeping or maintaining any club room or other place in which any intoxicating liquor * * * in any quantity whatsoever is received or kept for the purpose of use * * * as a beverage * * * and whoever shall use

> * * * any intoxicating liquor * * * so received or kept shall upon conviction thereof be fined * * *."

The Court held that this ordinance was not within the authority conferred by the charter, saying at p. 608:

> "It is very clear that the express words of the charter, 'to regulate, prohibit or license the selling' of intoxicating liquor do not include the power to make it an offense to receive, keep or use liquor at a club or other place for individual, personal use as a beverage, only where there is no element of selling or even giving away or disposing of the same, nor anything in the conduct or actions of those who received, kept or used the liquor that gave others any ground for complaint except the mere fact of receiving, keeping or using it. Nor can it be fairly said that the power to make it an offense to maintain a club where liquor is received, kept or used as a beverage by the individual owner thereof for his personal use, only, is necessarily or fairly implied or incident to the power expressly granted to regulate, prohibit or license the selling of liquor."

The Supreme Court of Illinois adhered to this view in *City of Marion* v. *Criolo*, 278 Ill. 159.

V.

The legal situation created by the Eighteenth Amendment is not entirely new, so far as rules for the construction of such legislation are concerned. Various States have in the past adopted somewhat similar constitutionel provisions prohibiting the manufacture of or traffic in intoxicating liquor, or authorizing local option communities to adopt such prohibitions. We believe that almost invariably where there has been such legislation either by

constitutional provision or statutory enactment, the courts have held that it did not apply to private possession of liquor lawfully acquired for personal consumption by the owner and his family and guests.

In the case of constitutional provisions of this character, the decisions to this effect have gone the extent of holding not only that such provisions did not render illegal such possession, but that legislation which, under the pretense of suppressing sale and traffic in liquor, declared illegal private possession for personal consumption, could not rest for its validity on the constitutional provision. So likewise in local option legislation, where the statute dealt with manufacture and traffic, the courts have decided that local ordinances which undertook to prevent private possession for personal consumption were unauthorized.

These decisions, it seems to us, are directly in point, because in the present instance general police power over the subject of intoxicating liquor was never possessed by Congress and has not been granted to it in this amendment; and consequently whatever legislative authority the amendment confers on the Federal Government must be derived from its own terms and not from any general principles of sovereignty.

In *Eidge* v. *City of Bessemer*, 164 Ala., 599, the City of Bessemer, claiming to act as a local option community, undertook to forbid any person to have liquor. The State statute went no further than to prohibit the manufacture and traffic. The question was whether for the purpose of local enforcement the City of Bessemer could forbid the possession of liquor. The Court held in the negative, and said (pp. 603-4):

"Counsel for appellant announce their inability to see any justice or common sense in a rule which would differentiate intoxicating liquors and beverages from burglars' tools, lottery tickets, infected clothing or diseased animals. They argue that liquors are put by the statute outside of the pale of law. Much the same argument was made in *Preston* v. *Drew*, 33 Me., 558, 54 Am. Dec., 639. In response, Shepley, C. J., said: 'It is, however, insisted on argument that a person by the common law, can no more acquire property in spirituous and intoxicating liquors than he can in obscene publications and prints. There is a clear and marked distinction between them. Such liquors may be applied to useful purposes. This is admitted in the act by its authorizing their sale for medical purposes. It is their abuse or misuse alone which occasions the mischief. Obscene publications and prints are in their very nature corrupting and productive only of evil. They are incapable of any use which is not corrupting and injurious to the moral sense.' In *Lincoln* v. *Smith*, 27 Vt., 328, the Court says: 'The act does not declare that they [liquors] are not property, and there is no language which should receive a construction to forbid their being property. Though there is a command not to sell them, yet that cannot prevent a man from having a property in them for his own use, without any intention to sell them.' In the case of *West Virginia* v. *Gilman*, 33 W. Va., 140, 10 S. E., 283, 6 L. R. A., 847, the defendant was charged under a statute which made it an offense to 'solicit or receive orders for, or keep in his possession for another, spirituous liquors,' etc. The Court observing that the provision of the statute which prohibited the keeping in possession for another had no reference to the interest or purpose for which the liquors were kept, but de-

nounced as a crime the simple fact that the liquor was kept in possession for another, however innocent the act or commendable the purpose, and announcing its opinion that, if it be a crime for a person to keep liquor in his possession for another, it would be equally so for him to keep it for himself, said: 'The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals or safety of the public; and therefore the statute prohibiting such keeping in possession is not a legitimate exercise of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void.' And later on: 'From what we have already said, it is apparent that the provisions of the statute under consideration is not a fair and reasonable exercise of the police power, nor has it any reference to the prohibition or sale of liquors. It is simply an attempt to make the possession of liquors for any purpose a crime. A very different question would be presented if the act had made it unlawful for any person to keep intoxicating liquors in his possession, either for himself or for another, for the purpose of selling it, or as a device to evade the revenue laws.'"

In *State* v. *McIntyre*, 139 N. Car., 599, the Court said, speaking of prohibition legislation in the various States of the Union (p. 601):

"No legislation, so far as we recall, has as yet gone to the extent of making the mere ownership or possession of whisky a crime except perhaps in furtherance of a State monopoly when in aid of the State's revenue. 'They have all stopped short of dealing with private

consumption of whisky,' says a recent writer on the subject. The only one we have discovered which approaches the extent claimed for the present law, was one in the State of West Virginia, making it a crime to keep in possession spirituous liquors for another, and this was declared unconstitutional by the Supreme Court of that State. *State* v. *Gilman*, 33 W. Va., 146.

"The Court does not desire or intend to express an opinion on this very important question. The comments are only made in support of the position that the act in question, from the context and the casual and incidental way in which it is expressed, does not and does not intend to, make the possession of whiskey in itself a crime, but that such possession of the prohibited quantity was only evidential in prosecution for the illegal sale of spirituous liquors, made criminal by other sections of the act."

Other authorities adopting a similar construction are:

Sullivan v. *City of Oneida*, 61 Ill., 242;
Titsworth v. *State*, 101 Pac. (Okl.), 288;
Commonwealth v. *Campbell*, 133 Ky., 50;
State v. *Intoxicating Liquors*, 69 Me., 524;
Henderson v. *Heyward*, 109 Ga., 373;
State v. Williams, 146 N. Car., 618.

We are not for the moment concerned with whether such of these decisions as deny even to State legislatures power to prohibit the possession of lawfully acquired liquor for personal consumption have rightly limited the constitutional power of the several sovereign States. No such constitutional question is here presented; and we have cited these decisions simply for the purpose of

showing that delegated power to prevent manufacture and traffic does not carry with it as an incident power to prohibit the mere possession of lawfully acquired liquor for personal consumption by the owner.

VI.

The very language of the Amendment shows that the intent of the enumeration was to define and limit the Federal power. Each of the specified relations to liquor is named in words of common use and accepted meaning; and the necessary implication was that the Federal power was extended over those but not over all relations to intoxicating liquor.

As Chief Justice Marshall said in *Gibbons* v. *Ogden*, 9 Wheat. 1, at p. 188:

> "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. * * * We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

In legislation of such importance, inference is strong that the language used was carefully selected; that the words were accurately and comprehensively fitted to the exact expression of intention; and that the legislative intent was not left to a filling out and amplification by inferences. This is particularly true where, as here, the legislation is penal.

In *Sarlls* v. *United States*, 152 U. S. 570, a section of the revised statutes prohibited the introduction of "any spirituous liquor or wine into the Indian country." The question arose whether lager beer was a spirituous liquor or wine. It was contended by the Government that a broad construction should be placed upon the phrase contained in the Act; that the legislative purpose was to prevent all intoxicating liquors containing alcohol from being taken into the Indian country. The court, however, at 575 stated:

> "Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a supposed public policy or purpose. The danger of substituting for the meaning of a penal statute, according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected, is pointed out by Chief Justice Marshall, when, in the case of United States v. Wiltberger, 5 Wheat, 76, 96, he said: 'To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.'"

This rule of construction is applicable to the class and character of possession prohibited as

well as to the character of the article prohibited. Had there been any intention in the Eighteenth Amendment to prohibit the mere possession or consumption of intoxicating liquor or to prohibit the continued possession of liquor lawfully acquired for personal consumption, that intention could and would have been expressed; and, in the absence of such expression, Congress has no power to add such prohibitions to those enumerated in the Amendment.

VII.

Still another principle of construction must be allowed its usual cogent influence.

In *South Carolina* v. *United States*, 199 U. S., 437, at p. 449, it was held that in interpreting the Constitution recourse must be had to the common law; and that such interpretation is necessarily influenced by the fact that the provisions of the Constitution are framed in the language of the common law.

The grant in the Eighteenth Amendment by the people of the United States to the Federal Government is not only in derogation of the State police powers, but in derogation of the common law and of vested property rights. Every implication is and must be against extending the grant further than the specific terms warrant.

There is no justification for giving the Amendment a confiscatory effect beyond the specified terms used. At the time of its adoption there was a vast amount of wealth in existing stocks of alcoholic liquor. The conclusion is inevitable that the people of the United States intended the disappearance of alcoholic liquor as a beverage to be somewhat gradual, by the prevention of its manu-

facture and the prevention of traffic in it. Without manufacture and without traffic there would eventually be little or no alcoholic liquor in this country for beverage purposes.

Such a conclusion is justified by the conservative temper of the Amendment. Certainly if it were intended to confiscate lawfully acquired property privately possessed at the time of the adoption of the Amendment, such intention must be express and not implied. Every intendment should be against such an arbitrary and extreme purpose. The validity of even less extreme power, under constitutional guarantees, has long been and still is questioned by this Court. In *Hamilton* v. *Kentucky Distilleries*, 251 U. S., 146, 157, this Court, per Brandeis, J., said:

> "The question whether an absolute prohibition of sale could be applied by a State to liquor acquired before the enactment of the prohibitory law has been raised by this Court, but not answered, because not necessary to a decision."

In *Barbour* v. *Georgia*, 249 U. S., 454, this Court, per Brandeis, J., said:

> "Whether the prohibition of sale may be constitutionally applied to liquor acquired before the enactment of the statute was raised in *Bartemeyer* v. *Iowa*, 18 Wall., 129, and *Beer Company* v. *Massachusetts*, 97 U. S., 25, 32-33, but was not decided."

In *Eberle* v. *Michigan*, 232 U. S., 700, this Court, per Lamar, J., at p. 706 said:

> "It was further contended that the Act takes property without due process of law because it made no provision for the sale of liquor on

> hand at the time the law became operative. But the record does not call for a decision of that question, nor does it bring the case within the principle suggested in *Bartemeyer* v. *Iowa*, 18 Wall., 129, 133, that a statute absolutely prohibiting the sale of property in existence at the time of the passage of the law would amount to confiscation and be void as depriving the owner of his property without due process of law."

In *Bartemeyer* v. *Iowa*, 18 Wall., 129, this Court, per Miller, J., at p. 133 said:

> "The weigh' of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even *prohibiting* the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of *Wynehamer* v. *The People*, 13 N. Y., 378, has held that as to such property the statute would be void for that reason."

In the case referred to of *Wynehamer* v. *The People*, 13 N. Y., 378, the Court at page 486 determined that the prohibition act in its operation upon property in intoxicating liquors existing in the hands of any person within the State of New York when the Act took effect was a violation of the provision of the New York Constitution which declared that no person should be "deprived of life, liberty or property without due process of law"; and that the various prohibitions and penalties contained in the Act substantially destroyed the property in such liquors, in violation of the constitutional provision.

In the case at bar the facts admitted by the procedure under which this case comes before the Court show that the appellant for many years before the passage of the constitutional provision had in his possession and control lawfully acquired wines and liquors. His intention in regard to those was and is lawful. He is holding them in a warehouse, which may be considered in the nature of a detached cellar, for the purpose of consumption by himself, his family and his *bona fide* guests. Certainly the express provisions of the Eighteenth Amendment do not prohibit such a possession. No implication is justified beyond those express terms, which would result in harshness, confiscation and the destruction of a property in method and extent previously considered unconstitutional.

In *Shawnee National Bank* v. *U. S.*, 249 Fed., 583 (C. C. A.) in a case involving the enforcement of a statute regarding intoxicating liquor, the Court at p. 586 said:

> "It is also a principle of law and natural justice that statutes will not be held to forfeit property, except for the fault of the owner or his agents, unless such a construction is unavoidable. *Peisch* v. *Ware*, 4 Cranch, 347, 2 L. Ed., 643; *United States* v. *33 Barrels of Spirits*, 1 Abb. U. S., 311, Fed. Cas. No. 16,470; *Clinkenbeard* v. *United States*, 21 Wall., 65, 22 L. Ed., 477."

VIII.

Inferences on the subject are particularly unjustifiable when they result in a retrospective action on the part of the legislation and result in confiscation of property lawfully possessed at the time of the passage of the Acts.

In *Southwestern Coal Co.* v. *McBride*, 185 U. S., 499, this Court at 503 adopted the reasoning of the Court below. Such Court below stated:

> "The function of the Legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the Legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the Legislature to possess the power, its acts will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation. If Congress had intended to deprive lessors of the royalties due and owing to them at the date of the act it would have used appropriate language to express that intention, and would necessarily have made some provision for the disposition of such royalties. But it is clear from the language of the act that it does not deal with the royalties already paid, or already due and owing to lessors under leases for coal already mined. * * * Congress, by the Curtis Act, neither attempted nor intended to interfere with the rights of lessors to royalties due them under their leases at the date of the passage of the act."

IX.

Furthermore, the fact that the Eighteenth Amendment constitues a grant of police power by the people of the United States to the Federal Government, suggests a rule of legislative construction applicable to government grants. Inasmuch as the police power on this subject previously resided in the states, and inasmuch as the Federal Government before this amendment had no police

power, it is reasonable that the extent of the grant be found in the words used.

No implication should be indulged in taking from the States further power than the language of the grant conveys.

In *Coosaw Mining Co.* v. *South Carolina*, 144 U. S., 550, the Court construed a state grant of South Carolina, and stated (p. 561):

> "If the Act of 1876 is fairly susceptible of either of the constructions we have indicated as we think it is, the interpretation must be adopted which is more than favorable to the state. The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an interest (Citing cases). Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication (Citing cases). This principle, it has been said, 'is a wise one, as it serves to defeat any purpose concealed by the skilful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' *Slidell* v. *Grandjean*, 111 U. S., 412, 438."

In *United States* v. *Herron*, 20 Wall., 251, the Court said (p. 263):

> "Sanctioned as that principle is by two express decisions of this Court, it would seem that further discussion of it is unnecessary, as it has never been questioned by any well-considered case, State or Federal, and is founded in the presumption that the Legislature, if they intended to divest the sovereign power of any right, privilege, title, or interest,

would say so in express words; and where the act contains no words to express such an intent, that it will be presumed that the intent does not exist."

POINT II.

The National Prohibition Act does not prohibit the possession of lawfully acquired liquor in a warehouse for the purpose of eventual private consumption.

I

The interpretation of the Act must be approached in the light of the authority for its enactment. It can have no legal efficacy except as it remains within the circumference of the special power delegated to Congress by the Eighteenth Amendment to enforce prohibition of those acts with reference to intoxicating liquor which are specially enumerated in the Amendment itself. The Act and the Amendment are in *pari materia;* and any construction of the Act which would cause it to overstep the Amendment should be avoided. (*State ex rel. Loften* v. *McMillan,* 55 Fla., 246; *Webb* v. *Ritter,* 60 W. Va., 193.)

Accordingly the text of Title II of the Act apparently strives to preserve a certain identity with the enumerations in the Eighteenth Amendment, which enumerations have to do with manufacture and transfer from one person to another.

Nowhere in that Title is the possession or consumption of liquor penalized as such. Whatever prohibition of possession there be is invariably limited to such possession as is in violation of the terms of the Title; and nowhere is mere consump-

tion made criminal. Consequently, as in the case of all penal statutes, the offense must be looked for in the express definitions and not in any omission to authorize.

Sec. 29 of the Title enumerates the penalties and attaches them solely to

> "Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined, etc.,"

Where, then, is there in Title II any criminal offense so defined as to cover the continuing to keep lawfully acquired liquor in a warehouse for the honest purpose of eventual private consumption by the owner, his family and guests? Such an act is none of the offenses enumerated in the Eighteenth Amendment, i. e., the manufacture, sale, transportation, importation or exportation of intoxicating liquors. Rather is it the mere continuance of the ultimate right of private property in liquor which has lawfully been acquired, an ultimate right which can not be taken away without confiscation of the last vestige of private ownership in such property.

To destroy the right to create liquor by manufacture, or to sell or transport it, is to destroy some of the recognized attributes of private ownership, but to leave still existent the right of private ownership itself. On the other hand, to prohibit the possession or use of such liquor even for personal consumption, is to destroy private ownership altogether, and to make of the article a thing so far outlawed that it cannot even be merely owned. Nothing in Title II of the Volstead

Act declares so complete a confiscation; and responsibility for such a revolutionary policy should be left with the law-making body and not be assumed by the courts through stringing together beads of supposition or speculation on the thread of implication.

II

The matter of possession is particularly dealt with in Sections 25 and 33 of Title II; and the attention there given by Congress to the subject should be deemed exhaustive, in accordance with the familiar rule that the particular must control the general, and that in a statute special provisions on the precise subject outweigh general expressions elsewhere.

Section 25 declares in its opening sentence:

> "It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor *intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property.*"

Here is an express definition by Congress itself as to the extent to which it intended to destroy the right of mere possession which is the fundamental and ultimate substance of all private ownership. When Congress declares that "no property rights shall exist in any *such* liquor or property" that declaration cannot be construed into a general outlawry of all liquor, for the word "such" can neither be avoided nor expunged. It relates back to the words "intended for use in violating this title or which has been so used"; *and thus conditions the unlawfulness of possession on the unlawfulness of the intended use.*

The word "such" also accompanies the word "liquor" as used in the subsequent sentences of the section,—sentences which have to do with the very delicate and dangerous power to issue a search warrant and to destroy seized property. Such destruction shall occur only "if it is found that *such* liquor or property was *so* unlawfully held or possessed, or had been *so* unlawfully used,"—thus constantly harking back to "liquor intended for use in violating this title." Only such liquor may be seized and annihilated.

If *any* possession of liquor for personal consumption were in itself a violation of the Title, the qualification as to intent would have no relevancy; and in such case, there would be no apparent reason for conditioning the right of destruction upon a prior finding of fact by a court of competent jurisdiction that the liquor "was *so* unlawfully held or possessed."

Since this section avowedly undertakes to deal with the subject of the possession of liquor and with the seizure, destruction and penalties consequent thereon, it must be presumed to complete and to exhaust the intent of Congress so far as mere possession is concerned.

III.

This view of the matter is reinforced by Section 33 which reads as follows:

> "Sec. 33.—After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess shall be *prima facie* evidence that such liquor is kept *for the purpose* of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title. Every person legally permitted un-

der this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only, and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfuly acquired, possessed, and used."

Here again, not possession as such, but the intent or "*purpose*" of the possession, is the thing condemned.

This section, it will be observed, recognizes possession by persons not of the class of those in receipt of express legal permits, and as to such possession the section declares that it shall be only *prima facie* evidence of the intent to keep the same for the expressly prohibited purposes specified in that sentence, *i. e.*, the purpose of transfer or traffic in any of its forms. If the presumption is rebutted, as it is in this case, then there is a residuum of legal right which prevents such possessor from falling within the condemnation pronounced on those who possess for such prohibited purposes.

In other words, Section 33 recognizes three classes of possession:

1. Possession pursuant to the system of permits set up by the earlier sections of Title II.

2. Possession by persons whose right of possession does not fall within the class of cases for which a permit is required, and yet whose possession is not maintained for any of the expressly prohibited purposes.

3. Possession for the purpose of transfer, *i. e.*, "for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this statute."

Persons in either of the first two classes are not acting "in violation of the provisions of this title." Persons in the first class are acting under authority of an express permit from the Government; and persons in the second class are acting under authority of their common law and constitutional right of ownership, subject only to the burden of disproving possession for one of the expressly prohibited purposes.

If all possession of liquor be illegal unless under a permit, the provision that possession without a permit shall be "*prima facie* evidence" of one of the expressly prohibited purposes, would be incomprehensible,—for in that case such possession would not be *prima facie* evidence but conclusive evidence of a violation of law. Indeed, it would be the offense itself.

Sections 4 to 9 of the act provide a system of permits under which liquor may be manufactured, transported or used for commercial or public purposes to a limited extent in specified instances, and subdivision 5 of section 1 of the act defines the term "permit" as follows:

> "The term 'permit' shall mean a formal written authorization by the commissioner

> setting forth specifically therein the things that are authorized."

The advantage of these permits is that they allow the use of liquor, in limited quantities, for certain commercial or public purposes, as distinct from a private purpose, and render the holder a "person legally *permitted* under this title to possess liquor" within the meaning of Section 33, and therefore unaffected by what otherwise would be the burden of disproving one of the expressly prohibited purposses in the possession of liquor.

But it does not follow that because the possessor is not a person "legally permitted," therefore he is a criminal. On the contrary, Section 33 presupposes that there still may be a wholly lawful possession, not under the system of permits, but under common law and constitutional right; and that as to such possession no penalty is attached except the burden of disproving one of the prohibited purposes.

Aid in the consideration of this part of the statute is given by *State* v. *McIntyre*, 139 N. C., 599, in which the Court had before it a statute of which one section reads:

> "That it shall be unlawful for any person to have in his or her possession or under his or her control more than two gallons of spirituous liquors or more than five gallons of malt liquors at any one time, and the possession of a greater quantity shall be *prima facie* evidence that such person is engaged in the illegal sale of liquor."

The Court said (p. 601):

> "This is all in one sentence, and the latter part of it, 'shall be *prima facie* evidence,' gives

> clear indication that it was the only effect contemplated as the result of forbidden possession contained in the first part of the sentence—the correct interpretation being that the Legislature only intended to give the possession of more than two gallons of whiskey evidential force on the charge of illegal sale, and did not intend to create a distinct and substantive offense."

The balance of Section 33 deals largely with the duty to report. Every person holding a permit is required to report the kind and amount of intoxicating liquors in his possession; but one who possesses liquor for personal consumption in his private dwelling is not required to obtain a permit or to report.

In short, Section 33, which deals specifically with the subject of possession, contains no words whatsoever which render criminal the possession of liquor lawfully acquired and maintained in a warehouse for personal consumption.

So far as the burden of proof is concerned, the appellant has sustained it. The motion to dismiss concedes for the sake of argument that the liquor is not kept for the purpose of transfer, *i. e.*, "sold, bartered, exchanged, given away, furnished or otherwise disposed of," but is being kept for a purpose nowhere declared criminal by Title II, *i. e.*, personal consumption. The bill of complaint expressly alleges that these liquors "are maintained, and will be used only for personal consumption by himself and the members of his family or his bona fide guests" (Rec., p. 3)—thus negativing any of the special purposes enumerated in Section 33.

In short, any analysis of Title II shows that Sections 25 and 33 are the only sections which deal specifically with the subject of possession; and

that they in no wise declare criminal possession in common law and constitutional right for the private purpose of personal consumption.

What these two sections aim at and by their language reach is not possession or consumption but the purpose of the possession. If the purpose be a commercial or public purpose, it is absolutely condemned, unless protected by a permit. On the other hand, if the purpose be merely private consumption by the owner, and not "the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title," then it is lawful and enjoys both common law and constitutional sanction.

IV.

Reference has been made by Judge Knox to Section 3 of Title II, which declares:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

We think that the learned judge has given a controlling force to this section which is unjustified.

(1) In the first place, the section is a mere generalization—a mere omnibus declaration of a general purpose. Whatever meaning may be attached to the word "possess" as therein used, it cannot control the detailed legislative intent on

the subject of possession set forth elaborately in Sections 25 and 33, and which is confined to the intent or purpose—for the general must yield to the particular. The rule of construction applicable to such a situation was stated by Mr. Justice Brewer, in *Long* v. *Culp*, 14 Kan., 412, 414, quoted by the Circuit Court of Appeals in *United States* v. *Jackson*, 143 Fed., 783, 787:

> "It is also a rule of construction that when one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental references is made thereto. Not because one section has more force as a legislative enactment than another, but because the legislative mind having been, in the one section, directed to this matter, must be presumed to have there expressed its intention thereon rather than in other sections where its attention was turned to other things."

(2) In the second place, as to the word "possess" used in Section 3,—to adopt the happy paraphrase by Ex-Senator Sutherland of *noscitur a sociis*, in his illuminating lecture on "Constitutional Powers and World affairs,—, this word must be known by the company it keeps—company of a distinctly commercial character. If by "possess" all or any possession was aimed at other than the limited possession allowed in limited instances under the system or permits then the preceding words having to do with manufacture, sale, transportation, etc., would have been useless, because the prohibition of possession would have included and covered them all and also any other conceivable relation to intoxicating liquor. To prohibit any possession

of intoxicating liquor is necessarily to prohibit its manufacture, sale, barter, transportation, etc.

Consequently, the very fact that Congress deemed it necessary to use eight different verbs before the verb "possess," for the purpose of indicating various special relationships to intoxicating liquor is positive proof that by the verb "possess" Congress was not contemplating possession in its broad sense, but rather was still contemplating a particular and special relationship such as is imported in the commercial implications of the previous verbs.

(3) In the third place, Section 3 is not a declaration of criminal offence. It is merely a general statement, and even then is expressly qualified by express reference to the rest of the Act. If by it all possession of liquor except such possession as was covered by the system of enumerated permits was rendered criminal, then the provisions of Sections 25 and 33 are incomprehensible. Those sections necessarily contemplate a possession which is not under legal permit and which yet is not a criminal offence. They show that it is not possession as such or in general, which is condemned; but the particular intent or purpose behind it.

The word "possession," in Section 3, has undoubtedly the same commercial significance as "kept" in Section 21 of the National Prohibition Act defining the conditions under which possession in various places is unlawful:

> "Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, *kept* or bartered in violation of this title, and all intoxicating liquor and property *kept* and used in maintaining the

same, is hereby declared to be a common nuisance," etc.

Words such as "possessed" and "kept," appearing in like context, have frequently received judicial interpretation.

In *State* v. *Lowry*, 166 Ind., 372, the Court was called upon, by reason of the arrest of the defendant, to construe a statute prohibiting the manufacture and keeping of cigarettes, which provided as follows:

> "Be it enacted by the General Assembly of the State of Indiana, that it shall be unlawful for any person, by himself, clerk, servant, employee, or agent, directly or indirectly, upon any pretense or by any device to manufacture, sell, exchange, barter, dispose of or give away, or keep for sale any cigarettes, cigarette paper, or cigarette wrappers, or any paper made or prepared for the purpose of being filled with tobacco for smoking; or keep or own, or be in any way concerned, engaged, or employed in owning or keeping, any such cigarettes, cigarette paper, or wrappers; and any person for violation of the same shall be guilty of a misdemeanor," etc.

At the time of his arrest, Lowry had in his possession one thousand cigarettes, which he had purchased of a dealer for his personal use and not for the purpose of barter and sale. The Court held that the statute did not apply to the act of possessing cigarettes solely for the purpose of smoking them—particularly since the words "keep" and "own" were preceded by those governing the manufacture, sale and giving away of such articles. The Court said (p. 390):

> "The only words in the statute which would be broad enough to cover the cases in hand

are 'keep' and 'own,' and yet we find that they are preceded by the words 'manufacture, sell, exchange, barter, dispose of, give away, or keep for sale.' As to the last-mentioned words, it will be perceived by what precedes them that the prohibition is not alone directed against what a person by himself may do, but that he is also subjected to the penalty for doing the same acts by his 'clerk, servant, employe or agent,' thus in a degree indicating that the prohibited acts may be done for him by others. Besides, the words 'keep or own' have immediately following them a prohibition against being 'in any way concerned, engaged or employed in owning or keeping any such cigarettes,' thus suggesting that this keeping or owning which is prohibited perhaps applies to a kind of keeping or owning in which others may be in some way concerned. Even the word 'keep' is said to be derived from the Anglo-Saxon word cépan, another form of cypan, meaning to traffic, sell, store up, and the like. Encyclopaedic Dict. One of the meanings of the word 'keep,' according to the Century Dictionary, is 'to have habitually in stock or for sale.' It is also to be noted that it is the keeping or owning of 'cigarettes,' the plural number, which is prohibited, a fact that has a degree of significance in view of what precedes."

In *Williams* v. *Fireman's Fund Ins. Co.*, 54 N. Y., 569, the Court held (to quote the headnote):

"The ordinary provision in a policy of fire insurance, prohibiting the storing or *keeping* of certain hazardous articles, *has reference to a storing or keeping, in a mercantile sense*, in considerable quantities, with a view to commercial traffic, or when storing and safe-keeping is the sole or principal object of the deposit; *not where the keeping is incidental, and only for the purpose of consumption.* The

> keeping of such an article in small quantities, for use as a medicine, is not within the prohibitions of such a policy, and does not avoid it.
>
> "It *seems*, also, that a restriction against using certain inflammable fluids for light, does not apply to a lamp used in a sleeping apartment, but to the use of such fluids as a light for stores, warehouses, shops and manufactories."

(4) That Judge Knox has misconceived Section 3 is clearly shown by his paraphrase of it (Rec., p. 15):

> "Section 3 of the Act provides that the possession of intoxicating liquors for any purpose, except as authorized by the Act, is unlawful."

We say, with all due respect, that that is precisely what Section 3 does not provide. It says nothing about "for any purpose"; and does not single out possession as a comprehensive term sufficient in itself to stand condemned. Nor does it declare that possession "is unlawful."

Judge Knox overlooks the manner in which Section 3 associates "possess" with the other verbs of special meaning; and that, so far from condemning possession "for any purpose," such comprehensive language is carefully avoided and the language is that of particularity and not of generality.

V.

The next reason advanced by Judge Knox for his decision, is that since, in Section 33, Congress has declared it not to be unlawful to possess liquors in one's private dwelling for personal consumption, that therefore it must be unlawful to possess liquors in any other place. We think this

is a *non sequitur;* and overlooks that Section 21 of the Act deals with the circumstances under which liquor may be possessed in various places.

Judge Knox says (Rec., p. 15):

> "This, it seems to me, is indicated by the language employed in the grant of permission to a householder to have liquors for personal consumption in his dwelling. Had Congress intended to legalize the possession of such liquors in any location it would not have been necessary to employ a new sentence (as is the case), wherein words of specific limitation are used. The very exclusiveness of the place of possession necessarily excludes all other places, and in making the restrictions so exclusive, Congress did not transcend its powers."

We fail to see that an express permission to possess in a particular place makes criminal all possession in any other place.

The reference to the lawfulness of possession in one's private dwelling was appropriate as express security for the sanctity of the home and for the purpose of relieving against the requirement of a report and against the presumption of a criminal purpose.

By the first sentence of Section 33 the Act attaches the presumption of a criminal purpose to all possession of liquor not held under a permit. This presumption may, it is true, be rebutted; but it is so heavy and troublesome a presumption, particularly when taken together with the requirement of a report, that Congress felt it too drastic in the case of liquor possessed for personal consumption in one's private dwelling. Consequently, Congress dealt with this very limited character of possession as a class all by itself, relieving it of the

duty of a report and of the presumption of criminality, on the condition, however, that such possession was for personal consumption only by the owner and his family and guests.

It is true that the sentence imposes upon the possessor of such liquor in a private dwelling the burden of proof "in an action concerning the same to prove that such liquor was lawfully acquired, possessed and used." But this burden of proof is altogether different and far less drastic than the presumption raised by the first sentence of Section 33. The first sentence makes the mere possession of liquor not covered by a permit "*prima facie* evidence" of criminality, *i. e.*, of possession for the purpose of transfer. In other words, such a possessor is subject to arrest merely because of the possession; and the mere possession establishes the prosecution's *prima facie* case, subject only to rebuttal by proof on the part of the possessor that he had no intent to dispose of the liquor in violation of the provisions of Title II.

Such a presumption is altogether different both in substance and degree from the burden of proof thrown by the last sentence of Section 33 on the possessor of liquor in his private dwelling. Such a person cannot be arrested merely because he is known to possess liquor in his private dwelling. In such case, the mere possession is not *prima facie* an offense. Whatever burden of proof does rest on him is limited to an "action concerning the" liquor and requires him to do no more than to show in such action "that such liquor was lawfully acquired, possessed and used."

In other words, the presumption in the first sentence of Section 33 is a presumption of crime and itself establishes presumptively an exist-

ing unlawful intent as to the present or future use of liquor; whereas the burden of proof referred to in the last sentence of Section 33 has to do only with the past acquisition or past use of the liquor and relates merely to the *onus probandi* as to such past acquisition or use when ever the same may become material in an action concerning the liquor.

Hence, we submit, Judge Knox was not justified in using the last sentence of Section 33 to eliminate from the first sentense thereof the recognition therein contained of the legality of the possession of liquor (not covered by a permit), subject, however, to the duty of rebutting the presumption of a criminal purpose. The last sentence has to do with the extension of special favors and immunities to a specially privileged situation, and was not intended at all as an exclusive designation of the place where liquor could be possessed without criminality, as distinct from the place where it could be possessed without having to rebut the presumption of criminality.

VI.

Furthermore, Section 21 of the National Prohibition Act undertakes to deal specifically with the circumstances under which possession of liquors in various places is unlawful.

It declares:

> "Sec. 21.—Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance."

Here, again, it is not the place as such where the liquor is possessed, but the nature and purpose of the possession, that is condemned. The purpose, "in order to entail the penalty upon the place, must be commercial. It must be a place where liquor is manufactured, sold, kept or bartered"—and not only so, but the trafficking therein must be "in violation of this title." Emphasis on the commercial purpose is created by the subsequent reference to "all intoxicating liquor and property kept and used in maintaining the same"—thus predicating a purpose to use the liquor to maintain the place.

In none of such language is there any condemnation upon the mere possession in any of said places of lawfully acquired liquor for private personal consumption by the owner.

The word "kept," not only upon the principle of *noscitur a sociis*, but according to its well-settled construction in such legislation, relates to a possession for a commercial purpose and not for mere personal use by the owner. See *State* v. *Lowry*, 166 Ind., 372, and *Williams* v. *Fireman's Fund Ins. Co.*, 54 N. Y., 569, discussed under Subdivision IV, *supra*.

Hence, in the face of the fact that Congress itself has defined the conditions and limitations under which places other than private dwellings may offend because of the presence of liquor, it seems little short of judicial legislation to declare that the dwelling house enjoys "the very exclusiveness of the place of possession."

Possession of the character and for the purpose presented by the instant case offends none of the terms of Section 21, no matter where such possession exists.

Hence the assumption that such possession is exclusively confined to the dwelling house begs the whole question.

VII.

The third reason advanced by Judge Knox assumes the very point to be proved. He says:

> "It (Congress) appreciated that, were liquors possessed elsewhere than in the private dwelling of the owner transportation would be a necessary incident to the use of the liquors, and to the end that the Act might be effectively enforced it did not mean to authorize the promiscuous transportation of liquors. Such transportation as the Act permits may be carried on only under the most stringent regulations. If possession of liquors anywhere were to be permitted, and if the places where liquor might lawfully be consumed for beverage purposes were likewise without limit, it would be necessary to imply that such liquors might lawfully be transported. This would inevitably follow."

Judge Knox, we submit, overlooked that what is being dealt with in the present case is liquor lawfully acquired and possessed for purposes of private consumption before the National Prohibition Act took effect. It would be legislation of the most extreme character, even if it were valid, which would outlaw all liquor which had been lawfully acquired and was being held for personal consumption except in those instances where the owner thereof was the fortunate possessor of a dwelling sufficiently capacious within which to store it.

Indeed such legislation would not only be an unprecedented attempt at confiscation, but it would be a most odious discrimination in favor of the

wealthy and well-mansioned. Such confiscation and discrimination must be supported, if it is to be supported at all, by explicit and clear legislation. No Court would deduce such a result from mere implication or inference. The responsibility for such a result must clearly and unequivocally be assumed by the law-making power,—particularly where such intent, if entertained at all, could have been clearly and directly expressed, and not left, purposely or otherwise, to the hazard of a judicial guess or to the doubtful outcome of conflicting inferences.

Title II of the National Prohibition Act expresses no such confiscation and discrimination. To contend otherwise is to assume the very point to be proved.

While Section 3 of the Title does contain a general reference to the term "transport," that reference must be construed, like the other terms contained in the section, by comparison with the special provisions later made in the Act with particular reference to "transportation." These special provisions occur in Section 10, 13, 14, 15 and 16, and show that Congress had in mind transportation in the commercial and public sense, for they deal exclusively with common carriers and consignors and consignees. For example, Section 10 provides:

> "Sec. 10. No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and con-

signee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this Act provided."

This section, it will be observed, deals expressly with prohibition of the transportation of liquor; and the unconscious and natural way in which the idea of transportation is coupled with the assumption of the existence of a consignor and a consignee illustrates the failure of Congress to conceive of transportation except in a commercial sense.

There is not a phrase in the entire Act which would justify anyone in assuming that the carrying of liquor in a flask upon a person for the purpose of private consumption, was for one moment conceived by Congress as an act of transportation. If so, why was it not mentioned and expressly prohibited; and why the elaborate prohibitions and permissions concerning every conceivable form of commercial transportation, and yet not a syllable as to this familiar form of carrying liquor?

Transportation implies a vehicle; and the kind of "transportation" which Congress had in mind is conclusively shown by its enumeration in Section 26 of the vehicles which are to be forfeited in the event of their use for the unlawful transportation of liquor, *i. e.*

> "Any wagon, buggy, automobile, water or air craft, or other vehicle."

Clearly, Congress never considered the clothes as a vehicle for transportation in the sense in which Congress was using that term.

The bald truth is, quite contrary to the construction of Title II by Judge Knox, that that Title contains nothing which confiscates or outlaws previously existing and lawfully acquired stocks of liquor when held for personal consumption or which prevents the consumption thereof by the owner. If such liquor is held in a private dwelling the owner is relieved of the presumption of criminality and the necessity for a report; if it is held elsewhere, the holding, while presumptively criminal, may nevertheless be shown to be honestly for the private use of the owner. The very permission given to rebut the presumption presupposes the lawfulness of the possession when the rebuttal is successful.

The Act contains no proposal to reimburse owners of existing stocks of liquor theretofore lawfully acquired for personsal consumption; and the outlawing of such entirely lawful property by legislative fiat would be a course so extreme and tyrannical that the very failure to provide for compensation is cogent proof that no such result was intended.

It is far more reasonable to impute to Congress the opposite intent from that imputed by Judge Knox,—to suppose that it intended the existing stocks of liquor to continue to be the subject of lawful personal consumption by the then owners, and thus in the end exhausted in a way which could not possibly harm the public. In that view of the matter, Congress could securely assume that because no fresh liquor could lawfully be manufactured for beverage purposes, and because no liquor at all could be sold or put into circulation in any form, it would only be a matter of time when the existing stocks of liquor privately owned

for personal consu[illegible]ption would have fulfilled their natural course, and, without the use of any tyrannical means or arbitrary confiscations, the country would come to the desired complete dryness.

Judge Knox's argument would have more weight if we were dealing with a case of liquor manufactured or acquired after the Act; for the ownership of such liquor would have been unlawful in its inception and hence outlawed from the beginning except so far as express provisions of the Act might extend it grace.

VIII.

To say, as does Judge Knox, that all possession is condemned by the Act as a mere incident of transportation is to beg the question; to assert a meaning for the Act which it itself does not declare, and to regard the fundamental right of possession as an incident of the lesser right of "transportation."

Transportation is an incident of possession, and not possession an incident of trasportation. The Act condemns transportation for commercial purposes; but it nowhere condemns the carriage of liquor on the person only, as an incident of the right of ownership and possession.

The word "transportation" is not generally applied to articles which a man carries in his clothing in the course of his ordinary ownership thereof for personal use, such as a pen or his money.

In the *Pipe Line Cases*, 234 U. S., 548, this Court, in interpreting the provisions of the Hepburn Act requiring persons or corporations engaged in interstate *transportation* of oil by pipe lines to become common carriers and subject to the provisions of the Act to Regulate Commerce, said (p. 561):

"There remains to be considered only the

Uncle Sam Oil Company. This Company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. *It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house.* So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end."

In *People* v. *Surdan*, 204 N. Y., 419, the Court was called upon to consider whether Section 103 of the Forest, Fish and Game Law, providing that "no person shall at any time *transport* any birds or fish for which a closed season is provided in any package, unless, etc.," applied to a person who carried such birds or fish to an expressman or a railroad company for transportation. The Court held that it did not; and said (p. 422):

"A careful reading of this second excerpt from the statute (Section 103) discloses two things. (1) It prescribes the conditions, not for shipment, but for transportation. 'No person shall transport' unless the package shall be plainly marked etc. To transport means to carry or convey from one place to another; as, to transport baggage; to transport goods; to transport troops' (Webster). As applied to a company or agency engaged in the carrying of goods from one place to another, either by land or water, the word 'transport' has a plain and definite meaning, and that is obviously the sense in which the legislature has used the term in this statute. The person who takes goods to another for

transportation is usually called the shipper and he is defined as 'one who consigns for shipment, goods, merchandise, or the like, to any common carrier for transportation, as to a railroad or express company' (Webster). *As to a carrier, the term 'transport' is apt, plain and precise;* as to a shipper, it is inapt and incorrect. (2) Even if we assume, therefore, that the prohibition against transportation, except under the prescribed conditions, relates to conveyance or carriage between points within the state, as to which there is some doubt, it seems to be directed against carriers as distinguished from shippers."

In *United States* v. *Forty-six Packages*, 183 Fed., 642, the Court had before it Section 10 of the Pure Food and Drug Act which provided that any article of food adulterated or misbranded which, having been transported, remained unloaded, unsold or in original packages, should be liable to be proceeded against by libel for condemnation. The Court held that the words "having been transported" condemned a transportation in interstate commerce and not a tranportation in intrastate commerce, and said that this construction of the act was rational and in accord with the maxim *noscitur a sociis.*

The cases cited below by the learned District Attorney on the subject of transportation have absolutely no application.

In *United States* v. *Hill*, 248 U. S., 420, the liquor was bought in one State for the purpose of being carried into a "dry" State. This carrtage was done by means of a trolley car; and the fact that the defendant accompanied the liquor so transported was a mere incident. The indictment expressly charged that the defendant, being in the State of Kentucky, "there intended to go and *be carried by means of a common carrier,* engaged

in interstate commerce"; and that, to this end, he did "then and there board a certain trolley car, being operated by a common carrier engaged in interstate commerce, and by means thereof, did cause *himself and the said intoxicating liquor*, then upon his person, to be carried and transported in interstate commerce into the State of West Virginia." This was in violation of the Reed Amendment, because as the Supreme Court said (p. 424):

> "The transportation of liquor upon the person of one *being carried in interstate commerce* is within the well-established meaning of the words 'interstate commerce.'"

United States v. *Chavez*, 228 U. S., 525, has nothing to do with transportation. The statutory word there was "export"; and the defendant was held liable to criminal prosecution because he did overt acts with an intent to export in violation of law.

IX.

Finally Judge Knox says (Rec., p. 16):

> "It is my judgment that any other construction of the Act would result in its emasculation. The sure defense of the purveyor and the bootlegger found with a flask of liquor in his pocket would be that he possessed the same for his personal use."

In other words, the rights of law-abiding citizens all over the land in property lawfully acquired and owned by them for personal use must be declared forfeited, confiscated and outlawed without compensation or redress because a little of this comparatively small stock of liquor might possibly escape into commercial channels.

This is a most extreme view.

So far as personal liberty is concerned, the policy of the law of the land has long been that it is better for some guilty persons to escape than that one innocent man should suffer. It is a novel view, and certainly a most extraordinarily tyrannical exercise of power, that a large amount of property innocent in itself and lawfully acquired should suddenly be outlawed without compensation in order possibly to reduce the chance of a little bootlegging. That chance exists in connection with any permitted existence of liquor at all in the community; and yet the Act is full of just such permissions.

The thought of the Act is that reasonable regulation and prevention in the matter of commercial and public uses can be accomplished by a system of permits through which the actions of persons having liquor in their possession could be controlled. If Congress had thought that there was danger of any grave abuse of the right to possess previously and lawfully acquired liquor for personal consumption, that abuse could much more readily have been checked and prevented by extending to such possession the system of reports and permits provided in the Act. The failure of Congress to do so, shows its appreciation of the obvious fact that the risk of the escape into commercial channels of the comparatively small amount of liquor privately owned for personal consumption was too slight to warrant such an annoying interference with personal liberty and private property.

An analogy for this may be found in the system of permits issued under the various conservation laws whereby certain persons holding permits are allowed to have in their possession and carry about the game which would be prohibited to persons not thus permitted. There is always a minimum

of chance that the permit may be abused; but the possibility of such abuse is not deemed to outweigh the proper liberties of the citizens.

We think that neither the reasoning nor the conclusion of Judge Knox can commend itself to this Court.

Under the Treasury Regulations a person owning intoxicating liquors lawfully acquired is entitled to a permit to transfer them from one residence to another; and if such a permit be refused, he is, under Section 6 of the Prohibition Act, entitled to secure it on application to a Court of Equity. (T. R., Section 84b). Yet clearly such a transfer results in "emasculation" of the Act quite as much as would a permit to transfer such liquors from a warehouse to a dwelling or from such dwelling to any other place where the owner may wish to consume them. And he is not denied but entitled to such permission, notwithstanding the fact that a "purveyor or bootlegger" with his flask may commit a crime by securing such permit on a false affidavit.

Inasmuch as the 18th Amendment, in laying down the five specific prohibitions as to intoxicating liquors, did not include prohibition against possession of liquors lawfully acquired and possessed before the date of the Amendment, we urge that property of such character was not reached or intended to be reached by the Amendment; that in the wording of the Amendment is to be found the public policy on the subject; that Mr. Street, provided the purpose be lawful, may possess and transfer and consume such liquors in any manner he may elect; that any attempt to legislate otherwise is as unauthorized as if there were no such Amendment.

A regulation which the Treasury Department might elect to promulgate by way of permits for

the transfer of such liquors—such as that provided for in their transfer from one residence to another —would not, perhaps, be objectionable on the ground of unreasonableness. But, even in such case, on the denial of the permit there would have to be an accompanying right on the part of Mr. Street to apply to a Court of Equity for its issuance, as is provided as to other permits under Section 6 of the Act. And until some such reasonable regulation is promulgated, Mr. Street is authorized to transfer his liquor when and as he pleases, always subject to the adverse burden of proof that it was lawfully acquired and is possessed for a lawful use.

POINT III.

If the National Prohibition Act does contain a prohibition of such possession as is presented in the instant case, it is to that extent unconstitutional.

The question of the constitutionality of such a prohibition, if it exists in the National Prohibition Act, depends upon the construction of the Eighteenth Amendment.

Judge Knox held that although the possession or consumption of liquor was not expressly prohibited in the Amendment (fol. 24), such prohibition was a corollary to the prohibition against transportation (fols. 24, 27). To quote his opinion:

> "It will thus be seen that nothing is said in the Amendment as to possession, as such, of intoxicating liquors, nor is there any prohibition against the consumption of intoxicating liquors, and it is urged by reason of this that it is therefore lawful for a person situated as is the complainant to have a supply of liquors intended for personal use in a storage ware-

> house, from which supply he may draw as desired. * * * Under the Eighteenth Amendment I am satisfied that Congress under the police power delegated thereby had the right to prohibit any transportation of liquors, and in order to reduce the necessity for transportation to a minimum it had the power to legislate as to the places where liquor might lawfully be possessed. It seems to me that in doing so Congress cannot fairly be said to have overstepped the boundaries of appropriate legislation."

This argument, if sound, can know no limitation of degree. If, as an incident of its power to enforce the constitutional prohibition upon the transportation of liquor, Congress may forbid possession of liquor in certain places, it may forbid possession of liquor in *all* places. This supposed implication of the power to forbid possession of liquor as an incident of the power to enforce the prohibition upon transportation of liquor, would give to Congress exactly the same power to prohibit the possession of liquor and to enforce such prohibition, as if such prohibition were one of the prohibitions expressly enumerated in the Amendment itself.

There would, however, be this difference, *i. e.* that whereas the other five pronibitions are fixed by the Amendment itself and cannot be added to or substracted from by Congress, a relation to intoxicating liquor which is larger than the five expressly prohibited relationships, whether taken singly or collectively, and which would comprehend all possible relationships to intoxicating liquor, is, according to Judge Knox's view, left within the discretion of Congress either to prohibit or not to prohibit. If the Amendment were intended to bear any such construction, how can its form or

phraseology be accounted for? Why did it not simply provide that Congress might forbid any and all possession of intoxicating liquor?

The prosecuting officers' argument amounts to this, that notwithstanding the Amendment itself is limited in express terms to five classes of possession and the power of Congress is limited to legislation appropriate to those five classes, nevertheless, as an incident of the power to prevent these five classes of possession, Congress may prohibit *all* classes of possession,—thus in effect rendering pointless the enumeration of the five classes. Such an argument, it seems to us, proceeds by converting the incidental into the transcendental; by inferring a grant of power to do the greater from an express grant merely to do the less.

Possession is a larger relation than transportation. All goods in transportation are in possession; but all goods in possession are not necessarily in transportation. We submit that the laws of construction and of language are defied by a judicial process which substitutes the word "possession" for "transportation" by a mere process of holding that for the purpose of legislation under the Amendment the two are convertible terms.

The National Prohibition Act itself gives no inkling that it proceeds on any such reasoning as is set forth in the opinion of Judge Knox.

Assuming that it does condemn such a possession as is set forth in this record, it can be said to do so solely by virtue of Section 3 of Title II, which declares:

> "Sec. 3.—No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this

> Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

The title of the Act begins by declaring it to be "An Act to Prohibit Intoxicating Beverages"; and the title of Title II, is "Prohibition of Intoxicating Beverages."

Giving, therefore, to Section 3 of Title II and to the whole Title the construction contended for by the prosecuting officers, we find as the necessary result that the declared purpose and policy of the Act is something other and larger and harsher than is contained in the Eighteenth Amendment itself.

That Amendment says nothing at all about the prohibition of intoxicating beverages; nor does it purport to confer any power whatsoever on Congress "to prohibit intoxicating beverages," or to legislate is such wise "that the use of intoxicating liquor as a beverage may be prevented."

Such language is not even a fair paraphrase of the Amendment, which has been carefully framed so as to define its own prohibitions, and thus to secure a ratification which might well have been withheld if other prohibitions or a more drastic policy had been proposed therein. Obviously an amendment which expressly proposed to authorize Congress to pass "An Act to Prohibit Intoxicating Beverages" would have been altogether a different proposal from that which was actually made and ratified. It would have involved a larger surrender of police power and State rights, on the part of the States; and it would have involved a greater increase in the power of the central government to interfere with personal liberty and to confiscate property throughout the country. It would

have been a grant of unrestrained power to outlaw all liquor and the consumption thereof under any and every circumstance. It could not have been adopted without an inconceivable surrender of fundamental State rights and personal rights which are vital to our theory of government.

And yet, if we place upon this Act the construction contended for by the prosecuting authorities, Congress has not only claimed the power to enact, but actually has enacted, a law which goes substantially the full limit of authority under such a constitutional amendment as has just been supposed.

If in Section 3 of Title II of the National Prohibition Act, the word "possession" is not limited as suggested in our preceding Point, but covers all forms of possession of intoxicating liquor, except such as is authorized by the system of special permits or under certain restrictions in one's private dwelling, then Congress has indeed put a construction on the Eighteenth Amendment which if pursued to its logical conclusion would permit it constitutionally to outlaw all intoxicating liquor under any and all circumstances; and has claimed and exercised the power to confiscate all lawfully acquired stocks of liquor intended solely for personal consumption, unless the owner thereof is fortunately so circumstanced that he has a private dwelling capable of containing them.

We challenge the right of Congress to do any such thing.

In the first point of this brief we have shown, we believe, that the Eighteenth Amendment is not legitimately capable of the construction which would sustain the power sought to be asserted in the National Prohibition Act as construed by the prosecuting authorities. The significance of the

form and substance of that Amendment as in itself a piece of specific penal legislation as to five specified classes of possession having to do solely with manufacture and traffic, cannot be avoided in view of well settled principles of construction and in view of the fact that Congress has been given solely a delegated power to enforce those specified prohibitions.

Furthermore, the National Prohibition Act, construed as is claimed by the prosecuting authorities, would not in that case be "appropriate legislation."

Not every species of legislation which has some tendency to accomplish a desired end is appropriate thereto in the constitutional sense; the relation must be more immediate, direct and substantial. It may well be an appropriate measure for the prevention of the spreading of a contagious disease to direct the sequestration and quarantine of persons who have been exposed to the contagion, but it is most emphatically not constitutionally appropriate to direct their being put to death. To prohibit the production of an untaxed substance in order to stimulate production and consumption of one subject to tax, of course, tends to increase the public revenue, but it has been distinctly held in respect of Federal legislation that "this consequence is too remote and too uncertain to warrant * * * saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes." (*United States* v. *Dewitt*, 9 Wall, 41, 44.) In *Hodges* v. *United States*, 203 U. S., 1, it was argued that the provision of the Thirteenth Amendment empowering Congress to enforce the prohibitions thereof by appropriate legislation, authorized it "to make * * * all attempts,

whether in the form of conspiracy or otherwise, to subject any one to the badges or incidents of slavery, offenses against the United States" and, therefore, that the Amendment justifieu an indictment for conspiracy to prevent citizens of African descent, because of their race and color, from making or carrying out contracts to labor (p. 27 *et seq.*). There can be no doubt that to have sustained this indictment would have tended to prevent slavery to some extent, but the Court, nevertheless, dismissed the charge as an inappropriate effort to enforce the Thirteenth Amendment and an undue encroachment upon the rights and powers of the several States. Similar considerations have determined the Courts to hold legislation under the Thirteenth, Fourteenth and Fifteenth Amendments not appropriate legislation of enforcement in such cases as *United States* v. *Reese*, 92 U. S., 214; *Civil Rights Cases*, 109 U. S., 1; *James* v. *Bowman*, 190 U. S., 127; *Lackey* v. *United States*, 107 Fed. 114, etc. Because abuses grow up in connection with an honest business may be adequate reason for hedging it about with due and proper regulations; but, as the Supreme Court has declared, that is not sufficient reason to justify its destruction by the legislature, nor make legislation, which in fact does not regulate, but absolutely prohibits, the business when honestly conducted, appropriate in the eye of the law. (*Adams* v. *Tanner*, 244 U. S., 590, 593, 594.)

What is appropriate legislation, as was long ago observed in the *Legal Tender Cases*, 12 Wall., 457, 540, depends upon the circumstances of the particular case; and in the case of the Eighteenth Amendment the most important circumstance lies in the fact that it does not purport to prohibit either the possession or the consumption of in-

toxicating liquors or to declare that the use of intoxicating liquor as a beverage is prohibited.

This view is but invoking a new application of the familiar principle that, while to test the constitutionality of a State statute recourse is had to the State constitution to discover prohibitions as to legislative power, the constitutionality of a Federal statute, on the other hand, is made to depend upon the fact whether warrant for it is found in the Federal Constitution. As said by this Court in *Kansas* v. *Colorado*, 206 U. S., 46, 87:

> "As heretofore stated, the constant declaration of this Court from the beginning is that this Government is one of enumerated powers. 'The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.'"

Mr. Volstead, in committee report and in debate has asserted that Congress, under the Eighteenth Amendment, had—pursuant to the authority of *Crane* v. *Campbell*, 245, U. S., 304—the power even to take away entirely the possession of liquors held as were those of Mr. Street.

Not only is *Crane* v. *Campbell* not an authority for such a contention, but the whole question as to whether even a State, with all its plenary police power, may deprive an individual of the possession of existing liquors lawfully acquired before the enactment of a prohibition statute, seems still to be in doubt in this Court.

> Barbour *v.* Georgia, 249 U. S., 459;
> Ruppert *v.* Caffey, Advance Sheets, p. 18.

The statutory situation in *Crane* v. *Campbell* was

altogether different from that presented by the special legislation contained in the Eighteenth Amendment.

In that case it appeared that the State of Idaho had enacted a statute with two independent but express prohibitions, *i. e.* one as to possession, and the other as to manufacture and sale. Each prohibition was at least of equal importance with the other in the mind of the Legislature; and if either purpose can be said to have more importance over the other in the legislative mind, it was that of forbidding possession rather than manufacture and sale. The opinion of the court below leaves little or no doubt as to this (27 Idaho, 671, 686):

> "The fact is, that the harm consists neither in the possession nor sale, but in the consumption of it. That is the evil which the people of Idaho, acting through the legislature, are trying to eradicate and since 'it will not require any elucidation to show that, if the citizen can be prohibited from having liquor in his possession, he can be prohibited from drinking it, because of necessity, no one can drink that which he has not in his possession,' and since great difficulty has been encountered in enforcing the prohibitory laws, the statement made by the learned jurist in the case of *Mugler* v. *Kansas* (123 U. S., 623), relative to the manufacture of intoxicating liquors for the maker's own use, as a beverage, might well be repeated with respect to its possession, which would make it read:
>
> 'And so, if, in the judgment of the legislature, the possession of intoxicating liquors would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the Courts, upon their views as to what is best and safest for the

> community, to disregard the legislative determination of that question.'"

Yet to show the irreconcilable difference between the Eighteenth Amendment and this statute of Idaho, Mr. Volstead himself, in debate—to which we are permitted to refer under the ruling of this Court in *United States v. St. Paul, M & M. Ry. Co.*, 247 U. S., 310, 318—said, when interrogated on the floor of Congress.

> "The object of the 18th Amendment is no doubt to prohibit the use of liquor, but there is no express provision against keeping it or drinking it. Consequently, I do not think we are violating the Amendment by allowing this provision to stay in the Bill." (Cong. Record, p. 3114.)

If the Eighteenth Amendment had forbidden the possession of liquor, *Crane* v. *Campbell* would have some analogy. But the whole substance of our point is that, precisely as Mr. Volstead admits, the Eighteenth Amendment does not prohibit possession as such.

We submit, therefore, that a body like Congress (unlike the legislature of Idaho), which possesses only enumerated delegated powers and is authorized only to pass appropriate legislation to enforce the constitutional prohibitions upon manufacture and traffic in liquor, cannot create a new prohibition which refers neither to manufacture to traffic but solely to possession lawfully acquired.

POINT IV.

The technical considerations urged in the court below for a dismissal of the bill were not adopted by the learned District Judge and have no force.

1.—It was said that the complainant has an adequate and complete remedy at law. What is it?

The liquor if seized and destroyed cannot be replaced. There is no market by which its value can be fixed. There is no standard by which the damages could be measured. Equity has a well settled jurisdiction to protect the owner of private property from irreparable injury; and, in the present case, there is no other forum by which the defendant, Porter, can be reached and made to desist from a course of official conduct which is causing the Lincoln Safe Deposit Company to evict the goods. There is no other forum by which in a single suit the complainant's rights in his leased rooms and in the liquors can be fully protected by a single determination which would settle the conflicting claims and assertions of the complainant, the warehouseman and the prosecuting authorities.

2.—It was said that an action cannot be maintained against the agent of the Commissioner of Internal Revenue to restrain him from taking steps to enforce the National Prohibition Act as he construes it.

The recent decisions of the Supreme Court make it too clear to permit of argument that a Federal court of equity has jurisdiction in cases challenging the constitutionality of an act of Congress, to restrain the defendant officers where, as clearly

appears in the case at bar, irreparable injury to business and property is reasonably to be apprehended, even though some of the acts sought to be restrained are anticipated criminal proceedings.

Ruppert v. *Caffey*, U. S. Sup. Ct., Oct. Term, 1919, No. 603, decided January 5, 1920;
Osborn v. *Bank of United States*, 9 Wheat., 738;
Dobbins v. *Los Angeles*, 195 U. S., 223, 241;
Ex parte Young, 209 U. S., 123, 155;
Western Union Tel. Co. v. *Andrews*, 216 U. S., 165, 166;
Herndon v. *C., R. I. & Pac. Ry.*, 218 U. S., 135, 155;
Philadelphia Co. v. *Stimson*, 223 U. S., 605, 619;
Truax v. *Raich*, 239 U. S., 33, 37;
Wilson v. *New*, 243 U. S., 332;
Hammer v. *Dagenhart*, 247 U. S., 251;
Hoffman Brewing Co. v. *McElligott*, 259 Fed., 525;
Scatena v. *Caffey*, 260 Fed., 756;
Municipal Gas Co. v. *Public Service Com.*, 225 N. Y., 89, 101.

3.—It was said that Title II of the National Prohibition Act provides within itself an adequate remedy, and reference was made to the last paragraph of Section 5 which mentions a proceeding in a court of equity to review the determination of the Commissioner.

But this remedy by its very terms is confined to a "manufacturer" and to a determination by the Commissioner that the article manufactured does not correspond to the descriptions and limitations,

and that, therefore, the manufacturer's permit to manufacture and sell should be revoked. That remedy has no application at all to the present instance.

Reference was also made to the provision in Section 6 that "in the event of a refusal by the Commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity." The complainant is not asking for a permit and the Act does not provide for the issue of a permit except where liquor is sought to be manufactured or used for a commercial or public purpose.

As to the claim that under Section 37, the complainant might store the liquor in United States bonded warehouses, the answer to the claim is that, assuming that this section applies to liquor privately owned for a private purpose, liquor once so stored could not be withdrawn except for the specified purposes for whicl. permits are necessary.

4.—It was also stated that for all that appears the prosecuting officer intends to proceed only by search warrant as provided in Section 25.

Section 25 refers for procedure as to search warrants to Title XI of Public Law No. 24 of the 65th Congress, approved June 15th, 1917. The procedure there provided is solely *ex parte*. When the search warrant is obtained the officer is authorized to break open any house or room; and, if subsequently the grounds on which the warrant was issued are controverted, the court must retain the goods to be disposed of according to law, if there is probable cause for believing the existence of the grounds on which the warrant was issued.

Such is not an adequate remedy. The complainant is entitled to protect his property from an

invasion which by forcible means would deprive him of his possession of it for an indefinite length of time, if not forever.

Besides it does not appear that the defendants propose to take solely this course. The bill alleges that the defendant, Porter, by means of threatened prosecution under the National Prohibition Act has forced the Lincoln Safe Deposit Company to order out the goods. This threatened prosecution was for violating the National Prohibition Act and for maintaining a common nuisance (fol. 7); and it is alleged, without contradiction, that the defendant warehouseman threatened and intended to invade the complainant's rooms to remove the wines and liquors from the rooms and deliver them to the defendant, Porter, who intended to seize and hold the wines and liquors and exclude the complainant therefrom and to treat them as outlawed goods. The bill further alleges that by removal from the rooms in which they were stored these wines and liquors are certain to be lost to the complainants and are likely, in whole or in part, to be wasted or destroyed, and the complainant thereby be subjected to irreparable damage. The complainant could have no adequate remedy at law against the defendant Porter based on the threats which are disturbing the relations between the complainant and the defendant warehouseman.

The record also contains certain rulings by the Internal Revenue Department (fols. 13-15) to the effect that privately owned intoxicating liquors held in public storage warehouses could not be sold or removed to the owner's residence after January 17, 1920; and also to the effect that they cannot be left in storage after January 17, 1920.

CONCLUSION.

The decree of the United States District Court for the Southern District of New York should be reversed and the motion made by the defendant Porter to dismiss the bill of complaint should be denied.

Respectfully submitted,

JOSEPH S. AUERBACH,
CHARLES H. TUTTLE,
MARTIN A. SCHENCK,
Of Counsel for Complainant.

Dated April 19, 1920.

APPEAL PRINTING CO., 32 THAMES ST.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

WILLIAM G. STREET, APPELLANT,
v.
LINCOLN SAFE DEPOSIT COMPANY AND DANIEL L. PORTER, Appellees.
No. 795.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEES.

This is an appeal from a decree of the District Court dismissing an injunction suit commenced for the purpose of testing the right of an individual owning intoxicating liquors, lawfully acquired before the Eighteenth Amendment became effective, to keep such liquors intended for his personal use in a storage warehouse, or any place other than his residence. The contentions are, first, that the act of Congress passed October 28, 1919 (41 Stat., c. 83, p. 305), known as the Volstead Act, does not, when properly construed, prohibit such keeping of intoxicating liquor; and, second, if that act does contain such a prohibition, it is to that extent unconstitutional.

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THE BILL.

It is alleged that the plaintiff is and was when the Eighteenth Amendment became effective the owner of a quantity of intoxicating liquors kept for his personal use, and that for some ten years he had kept these liquors in certain rooms in a storage warehouse, which he leased for that purpose. It is then alleged, in substance, that the warehouse company has notified him that, since the Volstead Act will make the keeping of intoxicating liquors in these rooms unlawful after January 16, 1920, he must remove them or they will be taken possession of by the Federal officers charged with the enforcement of the prohibition law. To prevent this, he filed his bill against the warehouse company and Daniel L. Porter, the agent of the Commissioner of Internal Revenue, appointed under the provisions of the Volstead Act, and charged with the duty of enforcing that act in the county of New York, where the warehouse in question is located.

THE LAW.

By the Eighteenth Amendment the manufacture, sale, transportation, importation, or exportation of intoxicating liquors is prohibited throughout the United States and all territory subject to the jurisdiction thereof. Title II of the Volstead Act was enacted to enforce this prohibition. Section 3 of that Title is as follows:

> No person shall on or after the date when the Eighteenth Amendment to the Constitu-

tion of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided; and the commissioner may, upon application, issue permits therefor: *Provided*, That nothing in this act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

Section 4 provides that, subject to certain regulations, denatured alcohol or denatured rum, medicinal preparations, patent medicines, toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes, and flavoring extracts and sirups that are unfit for beverage use, and vinegar and preserved sweet cider, shall not be subject to the provisions of the act, and that persons manufacturing them may purchase and possess liquor for that purpose, but before doing so shall be required to secure permits both to manufacture such articles and to purchase the necessary liquor, upon giving such

bonds and keeping such records and making such reports as may be required by the Commissioner of Internal Revenue.

Section 6 is as follows:

> No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the commissioner is conducting a bona fide hospital or sanatorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the commissioner shall prescribe, purchase and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution.
>
> * * * *

Section 7 provides that no one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor, and contains a number of restrictions as to the circumstances under which and the manner in which such prescriptions may be issued.

Sections 8 to 20, both inclusive, contain numerous provisions relating to the manufacture, sale, transportation, and dispensing of liquors *for nonbeverage purposes.*

Section 21 provides that "any room, house, building, boat, vehicle, structure, or place where intoxi-

cating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance." Sections 22 to 24, both inclusive, provide for proceedings against such nuisances.

Section 25 is as follows:

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property.

This section then provides for the issuance of search warrants, but adds:

> No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house.

Sections 26 to 32, both inclusive, contain specific enforcement features.

Section 33 is as follows:

> After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima

facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title. Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the Eighteenth Amendment of the Constitution of the United States goes into effect the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only, and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.

Section 37 provides that—

> Nothing herein shall prevent the storage in United States bonded warehouses of all liquor manufactured prior to the taking effect of this act, or prevent the transportation of such liquor to such warehouses or to any wholesale druggist for sale to such druggist for purposes not prohibited when the tax is paid, and permits may be issued therefor.

RULING OF THE COURT BELOW.

The District Judge held that, under the provisions of the act above referred to, the possession of liquor

for beverage purposes was prohibited except in the case of such liquors lawfully acquired before the Eighteenth Amendment became effective and thereafter kept in one's private dwelling, and that this prohibition was constitutional and valid.

BRIEF.

I.

The possession except in one's private dwelling of intoxicating liquors for beverage purposes is prohibited by the Volstead Act.

Appellant insists that when the Eighteenth Amendment became effective he owned the liquors in question and was keeping them for his personal use in rooms leased by him in a storage warehouse. His contention is that the Volstead Act, properly construed, does not prohibit him from continuing to keep them in these rooms, but only requires him, under section 33 of the act, to report to the Commissioner of Internal Revenue the kind and amount of liquors thus in his possession. It is extremely difficult to see how anything in the act can give the slightest color to this contention. Section 3 contains an express prohibition against *possessing* any intoxicating liquor "except as authorized in this act." The same section then provides for the possession of intoxicating liquors for nonbeverage purposes, but only under permits to be issued by the Commissioner of Internal Revenue. Under this section the authority to possess intoxicating liquors is limited to liquors for nonbeverage purposes. The

other sections quoted above make specific provision for permits to purchase and possess liquor for various nonbeverage purposes, carrying out the intent to draw generally a line between liquors intended for beverage purposes, the possession of which is prohibited, and liquors for nonbeverage purposes, which may be possessed only under permits. An examination of the sections quoted will show that, with a single exception, this rule is not departed from throughout the act. Every provision for a permit is applicable to liquors intended for some nonbeverage purpose. Section 33, following the various provisions for issuing permits, requires every person entitled to such permits to report to the Commissioner of Internal Revenue within ten days after the Eighteenth Amendment becomes effective the kind and amount of intoxicating liquors in his possession. No one not legally permitted to possess liquor is required to make any such report. The effect of the act, then, is to specifically set out the cases in which permits may be issued and to require a full report to be made of all liquors thus legally held under permits. If there was nothing else in the act, the prohibition against the *possession* of liquor for beverage purposes would be absolute and unqualified, for there is no provision for a permit under any circumstances to possess liquor for this purpose. Section 33, however, makes an exception in the case of liquors lawfully acquired and kept in one's private dwelling. That this is to be the only exception is emphasized by the fact that, instead of requiring a

report of liquor so acquired and held to be reported and a permit obtained, the section in question simply adds:

> But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein.

With this one exception, the possession of liquor, except when held under permits for nonbeverage purposes, is absolutely prohibited. Section 33 makes the possession without a permit prima facie evidence that the liquor is kept for an illegal purpose. Section 25 authorizes, upon a proper showing, a search warrant to discover illegal possession. The right to keep lawfully acquired liquor in one's private dwelling is protected, however, by the provision that no search warrant shall issue to search such a dwelling.

Appellant's contention that he is only required to make a report of his liquor to the Commissioner of Internal Revenue does not comply with any provision of the act. On the contrary, he is expressly excused from making such report or obtaining a permit for keeping, for his personal use, lawfully acquired liquor in his home, and the Commissioner is not authorized to issue a permit for such purpose. The lawfulness of his possession,

therefore, can depend in no way upon whether he makes a report or applies for a permit. It depends alone upon whether the liquor has been lawfully acquired and is kept in the only place in which the law authorizes it to be kept—that is, in his private dwelling. In this case the right is asserted to keep it stored in a public warehouse. The prohibition against this is as plain as words can make it; and if it was within the power of Congress to enact such a prohibition, the decree of the court below was manifestly correct.

II.

The prohibition against the possession of liquor for beverage purposes is constitutional.

It is said that, adopting the Government's construction of the Volstead Act, the provision making it unlawful to possess, except as therein provided, intoxicating liquors for beverage purposes is unconstitutional, because, while the Eighteenth Amendment prohibits the sale, manufacture, or transportation of liquors, it does not prohibit the mere *possession* of them, and that Congress is without power to extend the constitutional prohibition. The answer to this is that the second section of the Eighteenth Amendment expressly empowers Congress to enforce the constitutional prohibition by appropriate legislation. Congress may, therefore, lawfully enact such legislation as is reasonably necessary to prevent the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, and thus to suppress the liquor traffic.

When Congress is given the power to legislate upon a particular subject matter to accomplish a designated purpose, its power to exercise such a control over the subject matter as may be necessary to accomplish the purpose is unquestionable. Thus, having the power to tax, when it has chosen to impose a tax upon the manufacture of intoxicating liquors, it has exercised always the power to control and regulate the possession of liquors in process of manufacture or fully manufactured until the tax is paid. Exercising the same power, when it has imposed a tax upon narcotic drugs, it has imposed numerous regulations and restrictions upon the possession, use, and dispensing of such drugs. *United States* v. *Doremus*, 249 U. S. 86.

The object of legislation under the Eighteenth Amendment is to prevent the manufacture, sale, or transportation of intoxicating liquors for beverage purposes. If such liquors are permitted to be held and possessed without restrictions, the detection and punishment of offenses, with any degree of efficiency, will be impossible. Neither can this constitutional provision be adequately enforced if the manufacture, sale, or transportation for nonbeverage purposes is not made subject to necessary regulations and restrictions. Accordingly, under the Volstead Act, sales of liquor for nonbeverage purposes are lawful, but, in order to prevent their being used as a cover for unlawful sales and a means of violating the law, they are permitted only under strict regulations. Moreover, the experience of the various States which have

adopted prohibition laws has shown that a prohibition against the possession of liquor is a necessary means of preventing its unlawful sale. For this reason, State statutes making such possession unlawful have always been sustained as constitutional. In the recent case of *Crane* v. *Campbell*, 245 U. S. 304, dealing with a statute of a State prohibiting the possession of liquor, Mr. Justice McReynolds said:

> And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose. (Pages 307–308.)

It is said, however, that the power of the State under its general police power is broader than that of Congress under the Eighteenth Amendment, and that the States, under their police powers, might, if they saw fit, prohibit the possession of liquor as an independent enactment, whereas Congress acquires the right to so legislate, if at all, merely as an incident to the right to enforce the specific prohibition of the Eighteenth Amendment. This argument, however, is completely answered by what was said by this court in *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

Moreover, it must be conceded that having the power to enact appropriate legislation to enforce the prohibition of the Eighteenth Amendment, Congress may lawfully enact such measures, not prohibited by other provisions of the Constitution,

as have a reasonable relation to the end to be accomplished. In the case of *Crane* v. *Campbell*, *supra*, the portion of the statute in question was not considered as an independent enactment, but the case turned upon whether it had a reasonable or proper relation to the suppression of the illegal traffic in liquor. At any rate, the language quoted above expressly holds that the inhibition of the possession of liquor is not "arbitrary and unreasonable or without proper relation to the legitimate legislative purpose." If it has a reasonable relation, as thus indicated, to the accomplishment of the end in view—the enforcement of the prohibition of the Eighteenth Amendment—its validity is beyond doubt.

Title II of the Volstead Act was to take effect contemporaneously with the going into effect of the Eighteenth Amendment. It was to apply, therefore, to a period of time when the manufacture, sale, or transportation of intoxicating liquor for beverage purposes was absolutely prohibited by the Constitution. At the time it took effect it was to be assumed that many persons in the United States would have in their possession intoxicating liquors which they had lawfully acquired and which were intended for the personal use of themselves and their families. Many others would doubtless have in their possession liquors acquired for purposes of sale. If Congress had left the continued possession of such liquors previously acquired unrestricted, an easy means of violating the law would have been

left open to the lawless. It therefore made unlawful the possession for beverage purposes of such liquor under all circumstances, except when held for the personal use of the owner. In the excepted case the right of possession was restricted, however. The owner who had lawfully acquired intoxicating liquors was permitted to continue in possession of them for beverage purposes, provided he kept them only for his personal use and on the express condition that they be kept in his private dwelling.

If he was keeping them for other than beverage purposes—for example, to sell to a druggist for medicinal purposes—he was permitted to keep them only at a Government bonded warehouse and transportation thereto was expressly permitted. The conditions imposed were reasonable ones, since the right to possess liquors which had been previously lawfully acquired, if unrestricted, would have been subject to the greatest abuses. Indeed, unless kept in his private residence, where they were to be used, it is difficult to see how the possession of liquors for beverage purposes could be of any advantage to the owner. After the 16th of January, 1920, the Constitution itself made the transportation of liquors unlawful. If, therefore, the owner could keep them in storage at a place away from his residence, it would be impossible for him to use them at his residence without violating the law by an act of transportation. Indeed, he could make no use of them without a violation of the law, except perhaps to go to the place of storage and drink them there. The

provisions of the Volstead Act, therefore, give the owner of such liquors the right to make every use that it would be practicable to make of them without a violation of the constitutional prohibition.

What has been said applies to liquors lawfully in one's possession at the time the Eighteenth Amendment took effect. There was, of course, no occasion to provide for the possession of liquors acquired for beverage purposes after that date, since the sale of liquor was prohibited by the Constitution and every purchase of it involved a violation of that prohibition. Moreover, liquor purchased after that date could not be used except by drinking it at the place of purchase without violating the other constitutional prohibition against transportation. Neither could it be manufactured for one's own use without violating the constitutional prohibition against manufacture. In the case of *Crane* v. *Campbell*, *supra*, Mr. Justice McReynolds said this:

> We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase, or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State. Page 308.

The right to possess liquor in one's home after January 16, 1920, if lawfully acquired before that date, covered all intoxicating liquors as to which there was any feasible way of getting them into possession. After that date there was no lawful means of acquiring such liquors for beverage purposes, and hence there was no "assured right of possession" in anyone which was destroyed by the Volstead Act. If the manufacture, sale, and transportation were unlawful, a possession that could result only from a resort to one or another of these means would also be unlawful—or, at least, would be something that could not exist without an unlawful act.

CONCLUSION.

It is respectfully submitted that the decree of the court below is correct and should be affirmed.

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WILLIAM L. FRIERSON,
Assistant Attorney General.

APRIL, 1920.

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